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No. 06-510

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In The
Supreme Court of the United States

HILLSBORO PROPERTIES, and
PAUL GOLDSTONE ENTERPRISES, INC.
dba RANCHO GRANDE MOBILEHOME PARK,

Petitioners,

v.

CITY OF ROHNERT PARK, a municipal corporation, and
CITY OF ROHNERT PARK RENT APPEALS BOARD,

Respondents.

On Petition For Writ Of Certiorari
To California Court Of Appeal,
First Appellate District, Division Three

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Hillsboro Properties and Paul Goldstone Enterprises, Inc. dba Rancho Grande Mobilehome Park ("Hillsboro") argue that U.S. Supreme Court review of this mobile home rent control dispute is warranted because Hillsboro has been unable to obtain damages for a regulatory taking in state court. In a twisted effort to substantiate U.S. Supreme Court review in this case, Hillsboro makes two arguments for the first time in this Court: 1) that California state courts are in "willful non-compliance with the mandate of *First English*," and 2) that the United States Supreme Court should rule on Hillsboro's taking claim directly, as a matter of federal law.

There are two glaring errors in this request for Supreme Court review. First, Hillsboro failed to raise any of these arguments to any of the courts below. Second, Hillsboro's arguments substantively have no merit. The Court of Appeal's opinion not only followed well-settled principle, but also complied with all mandates of *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987). Moreover, U.S. Supreme Court precedent is clear that Hillsboro has no constitutional right to have its regulatory taking claim reviewed in the first instance by this Court.

This dispute involves the City of Rohnert Park's ("City's") mobile home rent control ordinance ("Ordinance"), which was adopted in 1987 and limited the amount by which a landlord of a mobile home park could raise rents. (Petition, Appendix ("Pet. App.") F at p. F-2.) Although the Ordinance did control rental adjustments in mobile home parks, it provided for an annual automatic adjustment tracking the Consumer Price Index. (Pet. App.

A at p. A-7.) It also included a procedure to apply for "net operating income" increase. (Pet. App. A at p. A-7.) The Ordinance explicitly stated that the "net operating income procedure" existed "in order to provide a just and reasonable return." (Pet. App. A. at p. A-7.)

In 1993, park owners challenged the Ordinance on the grounds that it did not permit park owners to earn a reasonable rate of return on the cost of capital improvements. (Pet. App. E at p. E-2.) The federal court found the Ordinance to be unconstitutional because it violated substantive due process by preventing mobile home park owners from collecting any profit on new capital improvements. (Pet. App. E at p. E-2.) On January 24, 1995, prior to the formal entry of judgment, the City adopted Ordinance No. 599, which amended the Ordinance, to add a "capital improvement pass-through" provision.[1] (Pet. App. E at p. E-2.)

In 2000, Hillsboro filed a second action in federal court seeking a declaration that the City was wrongfully enforcing the Ordinance, as amended. (Pet. App. A at p. A-6.) In December 2002, the federal court ruled that the 1995 amendments had corrected the constitutional defect in the Ordinance and entered judgment in the City's favor. (Pet. App. A at p. A-6.)

In August 2003, Hillsboro unsuccessfully attempted to apply to the rent board for a "*Kavanau* adjustment" rather

[1] At the conclusion of the 1995 litigation, the tenants and the City voluntarily stipulated to a limited duration rent increase to cover the cost of capital improvements made by Hillsboro. (Pet. App. A at p. A-16, Pet. App. D at p. D-6.) Hillsboro does not claim that it has made any capital improvements since that time that would have warranted a capital improvement pass-through. (Pet. App. A at p. A-16.)

than following the procedures set forth in the Rules and Regulations of the Rent Appeals Board. (Pet. App. A at p. A-6.) The City Attorney did not accept the application and directed Hillsboro to the procedures outlined in the applicable Rules and Regulations. (Pet. App. A at pp. A-6, A-8.)

In September 2004, Hillsboro filed suit in the Superior Court for, among other things, inverse condemnation, a declaration that the ordinance had effected an unconstitutional taking, and a writ of mandate ordering the rent board to consider the application. (Pet. App. A at p. A-8.) In this action, Hillsboro sought to recover, either from its tenants or from the City, rents in excess of the rent control ceiling for the period during which the Ordinance, subsequently held to be unconstitutional, was in force: January 16, 1988 – January 24, 1995.[2] (Pet. App. A at p. A-6.) Rather than alleging that Hillsboro had made any capital improvements for which it was entitled to compensation, Hillsboro's complaint challenged the Ordinance's rent ceiling in general. (Pet. App. A at p. A-16.)

The trial court sustained the City's demurrer to the complaint without leave to amend, dismissing the first four causes of action as time-barred and ruling that the remaining six causes of action failed to state a cause of action. (Pet. App. A at p. A-8.) On April 6, 2006, the Court of Appeal affirmed the trial court's judgment stating "[t]o

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[2] Any challenge to the City's actions are also time barred. Hillsboro's claim accrued at the latest in 1995. More than eighteen years have elapsed since the Ordinance was adopted and more than eleven years since its amendment by Ordinance No. 599. The longest statute of limitations for any type of inverse condemnation claim is five years. *Travis v. County of Santa Cruz*, 33 Cal.4th 757, 775 (2004). Hillsboro's challenge to the Ordinance is too late by any measure.

the extent that Hillsboro is challenging the City's refusal to authorize a "*Kavanau* adjustment," its claim fails because it does not allege the facts necessary to establish its right to such an adjustment, namely that enforcement of the ordinance has deprived it of a fair and reasonable rate of return on its investment." (Pet. App. A at pp. A-16, A-17.) Hillsboro elected not to request rehearing from the appellate court but instead petitioned the California Supreme Court for review.[3] On July 12, 2006, the California Supreme Court denied review.

On October 9, 2006, Hillsboro filed its Petition for Writ of Certiorari with this Court.

REASONS FOR DENYING REVIEW

I. THE QUESTIONS PRESENTED BY HILLSBORO REGARDING CALIFORNIA STATE COURTS' NONCOMPLIANCE WITH *FIRST ENGLISH* DOCTRINE AND HILLSBORO'S ENTITLEMENT TO DIRECT U.S. SUPREME COURT ADJUDICATION OF ITS TAKING CLAIM DO NOT WARRANT REVIEW BY THIS COURT.

For the first time in this Petition, Hillsboro argues that 1) California courts are in willful noncompliance with *First English* mandates because they have effectively reimplemented *Agins v. City of Tiburon*, 24 Cal.3d 266

[3] Because Hillsboro failed to request rehearing, the statement of the facts and issues posed by the Court of Appeal should be accepted as true for purposes of Hillsboro's Petition. *Hernandez v. New York*, 500 U.S. 352, 366 (1991); Cal. Rule of Court, Rule 28(c)(2).

(1979)[4] by deciding and following *Kavanau v. Santa Monica Rent Control Board*, 16 Cal.4th 761 (1997), and 2) as Hillsboro is barred from litigating its claim in federal district court by this Court's recent decision in *San Remo Hotel v. City and County of San Francisco*, 545 U.S. 323 (2005), its claim is ripe for adjudication directly by the U.S. Supreme Court. (Petition, p. i, 11, 13) This case presents a poor vehicle for resolving these issues both because the issues were not raised below and also because these issues raise no viable federal question.

A. Neither the Decision Below Nor the Record Raises the Questions Presented by Hillsboro Regarding State Courts' Noncompliance with *First English* or Adjudication of Hillsboro's Taking Claim Directly in the United States Supreme Court.

United States Supreme Court Rule 14 provides that a petition for review of a state court judgment must specify the following:

> The stage in the proceedings, both in the court of first instance and in the appellate courts when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof,

[4] Under *Agins* a takings plaintiff in California was not entitled to just compensation for the period during which the regulation in question was enforced. *Agins v. City of Tiburon*, 589 P.2d at 31.

> with specific reference to the places in the record where the matter appears.
>
> (S. Ct. R. 14(g)(i).)

This Court has imposed those requirements "so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari." *Id.*

Hillsboro does not, nor can it, provide this Court with any of the information required by Rule 14 because Hillsboro raises these two new questions for the first time in its petition to this Court. Hillsboro never raised any of these arguments at the trial or appellate court levels or in its petition for certiorari to the California Supreme Court. Had Hillsboro done so, those courts would have had an opportunity to analyze Hillsboro's arguments in light of its takings claim.

When a petition raises questions which were not decided by the court below because they were not raised in that forum, any such defect is ordinarily fatal to the petition. Robert L. Stern et al., Supreme Court Practice 459-460 (8th ed. 2002). Hillsboro's petition for review by this Court should be denied, because the courts that considered the case below were never given the opportunity to review or analyze these arguments.

B. Even If Properly Raised, Hillsboro's Argument That California State Courts Are In Noncompliance With The Mandates Of *First English* Is Without Merit.

Hillsboro argues that California state courts, including the Court of Appeal in this case, by following *Kavanau*

v. Santa Monica Rent Control Board, have "carved out a special category of regulatory takings for which the California courts offer no remedy at all." (Pet. p. 12-13.) According to Hillsboro, this runs afoul of the mandates of *First English*. This misstates the law.

Kavanau merely states that a landlord's " . . . continuing right to an adjustment of future rents *can provide an adequate remedy* [emphasis added]." *Kavanau v. Santa Monica Rent Control Board*, 16 Cal.4th at p. 783. *Kavanau* did not decide what alternative remedy might be appropriate if a landlord shows that the remedy of future rent adjustments is for some reason unavailable or inadequate. *Id.* at p. 785. A landlord retains the ability to file an inverse condemnation claim in the event that a *Kavanau* adjustment is inadequate. *Carson Harbor Village, Ltd. v. City of Carson*, 353 F.3d 825, 828 (2004); *Galland v. City of Clovis*, 24 Cal.4th 1003, 1025 (2001).

Hillsboro continues this line of argument, stating that " . . . California provides no remedy of any kind for regulatory takings of the sort Hillsboro has suffered." (Petition, p. 14.) Yet Hillsboro has not demonstrated that it suffered a "taking." Hillsboro appears to argue that inverse condemnation should be available in the absence of any "constitutional injury." This is simply not the law. Both state and federal courts require the demonstration of a "constitutional injury" in order to obtain "just compensation" for that injury. *Tahoe Sierra Preservation Council v. Tahoe Reg. Pl. Ag.*, 535 U.S. 302, 328 (2002) (holding that under this Court's *First English* decision a state must provide a remedy only where taking has been established.) In short, in line with federal case law, California courts do provide an inverse condemnation remedy – but only in the

event that a landlord demonstrates that he or she has suffered a constitutional injury.

This Court has consistently affirmed that states have broad power to regulate the landlord-tenant relationship without paying just compensation for all economic injuries resulting from the regulation. *Yee v. City of Escondido*, 503 U.S. 519, 528-529 (1992); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982); *Bowles v. Willingham*, 321 U.S. 503, 517-518 (1944) (rent control); *Block v. Hirsh*, 256 U.S. 135, 157 (1921). The government may place ceilings on the rents a landowner can charge. *Yee v. City of Escondido*, 503 U.S. at 529. This type of non-possessory regulation is generally not recognized as a taking unless it "goes too far," and unjustly requires the landlord to pay for a public benefit which ought to be compensated by the government. *Yee v. City of Escondido*, 503 U.S. at 531; *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978).

This Court has determined that a rent control ordinance goes too far when it deprives the landlord of a fair and reasonable return on investment. *Federal Communications Commission v. Florida Power Corp.*, 480 U.S. 245, 253 (1987) (maximum rate may stringently limit the return on investment so long as rates are not confiscatory) ("*Florida Power*"); *Pennell v. City of San Jose*, 485 U.S. 1, 9 (1988) (discussing, but not deciding, whether a rent control ordinance reduced rates below an objectively reasonable amount); *Pennell v. City of San Jose*, 485 U.S. at 20-21 (Scalia, J., concurring).[5] In *Florida Power*, this Court held

[5] Concurring in *Pennell*, Justice Scalia argued that under the Takings Clause a rent control ordinance which permits "reasonable rents" does not constitute a taking. *Pennell v. City of San Jose*, 485 U.S.

(Continued on following page)

that there is no Fifth Amendment taking of property where the rate was reasonable and not confiscatory.[6] *Federal Communications Commission v. Florida Power Corp.*, 480 U.S. at 253.

As the foregoing demonstrates, California courts, including the Court of Appeal in this case, are in compliance with both the state and federal Constitutions, as well as the mandates of *First English*. Despite Hillsboro's strong desire to the contrary, state and federal precedent make clear that in the context of rent regulation, a taking cannot exist absent the denial of a fair return. Hillsboro cannot establish this necessary prerequisite to stating a takings claim. As a consequence, the Court of Appeal in this case correctly followed both state and federal precedent in holding that Hillsboro could make no claim for a regulatory taking.

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at 20-21 (Scalia, J., concurring). He reasoned that where the landlord receives a reasonable return the landlord does not disproportionately bear a public burden because the landlord is in part responsible for the housing conditions which necessitated rent regulation. *Id.* at 20. However, where the rent is reasonable the landlord is no longer responsible for the housing conditions. *Id.* at 21. Thus, any reduction below a reasonable return constitutes a taking for which compensation must be paid. *Id.* at 23-24.

[6] In *Florida Power*, the FCC was empowered to regulate the rates under which cable company tenants leased space on utility poles under certain circumstances. *Federal Communications Commission v. Florida Power Corp.*, 480 U.S. at 248. This Court found the rate was reasonable because the regulation provided that rates should permit the utility to recover its fully allocated costs. *Id.* at 254. On this basis, the court rejected the argument that the regulation amounted to a non-possessory taking without just compensation. *Id.*

C. Even If Properly Raised, Hillsboro's Argument That This Court's Decision In *San Remo* Renders This Dispute Eligible For Direct Review By The United States Supreme Court Is Without Merit.

Hillsboro reads the *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) and *San Remo* decisions together to conclude that its petition is entitled to review by this Court. Hillsboro argues that its case is ripe for federal review under *Williamson County* and then points out that, under *San Remo*, it is precluded from relitigating in federal court issues that were previously litigated in state court. (Pet. p. 14.) Hillsboro somehow extrapolates from these decisions that it is entitled to review by this Court. (Pet. p. 15.) Neither *Williamson County* nor *San Remo* support this view.

It is well settled that there is no constitutional right to vindicate federal takings claims in federal court. *San Remo*, 545 U.S. at 331; *Allen v. McCurry*, 449 U.S. 90, 103-104 (1980). This Court's decision in *San Remo* did not create a special entitlement to Supreme Court review for regulatory takings plaintiffs like Hillsboro. *San Remo* simply held that, under 28 U.S.C. § 1738, a takings plaintiff is not entitled to relitigate issues in federal court which were already decided in state court. *San Remo*, 545 U.S. at 338, 348. The Court reasoned that "it is entirely unclear why [petitioner's] preference for a federal forum should matter for constitutional or statutory purposes." *Id.* at 334. The Court went on to state that there was little precedent for federal litigation of claims that a state has taken property in violation of the Fifth Amendment and

that state courts are fully competent, if not more experienced, in hearing such claims. *Id.* at 346.

Hillsboro now attempts to push the argument rejected by this Court in *San Remo* one step further. Hillsboro argues that this Court should rule on its federal taking claims directly because "access to the lower federal courts is barred by *San Remo*."[7] (Pet. p. 8.) *San Remo* does not support that proposition. Contrary to Hillsboro's assertions, this Court clearly stated that a plaintiff claiming a regulatory taking has no special right to have federal takings claims decided in any federal court. *San Remo*, 545 U.S. at 342. "This is so even when the plaintiff would have preferred not to litigate in state court, but was required to do so by statute or prudential rules." *Id.; see also Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 477 (1982). Notably, in *San Remo* the Court affirmed dismissal of the petitioner's federal takings claims without reaching the merits. *Id.* at 347-348. The simple fact that Hillsboro's claim will ultimately be decided by a state court does not entitle Hillsboro to review by this Court. As contemplated in *San Remo*, California courts have competently adjudicated Hillsboro's federal claims in accordance with this Court's takings jurisprudence. *See id.* at 346-47. Hillsboro

[7] Hillsboro supports its argument by claiming that in *San Remo* this Court suggested that the petitioner should have sought compensation by way of a writ of certiorari to this Court. (Pet. at p. 15 citing *San Remo*, 545 U.S. at 334.) This is patently false. In laying out the procedural history of the case, the Court in *San Remo* simply notes that the petitioners returned to federal district court upon rejection of their claims by the California Supreme Court rather than seeking a writ of certiorari. *Id.* The Court's analysis attaches absolutely no significance to this procedural fact.

has had its day in court and its Petition for Writ of Certiorari does not warrant further review.

II. THE DECISION OF THE CALIFORNIA COURT OF APPEAL WAS CORRECT.

Hillsboro's challenge to the Court of Appeal decision is simple: Hillsboro disagrees with the well-established principle that rate regulation is judged to be a taking only when its effect has been actually confiscatory.[8] *Kavanau*, 16 Cal.4th at 771; *Jersey Cent. Power & Light Co. v. F.E.R.C.* 810 F.2d 1168, 1181, fn.3 (D.C. Cir. 1987). Hillsboro is incorrect. There is no "taking" absent denial of a fair return. Both the Court of Appeal in this case and federal precedent make clear that in the context of price regulation, no constitutional injury reaching the level of a "taking" is established unless the property owner demonstrates the denial of a "fair return" on its investment. (Pet. App. A at p. A-14) *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 308, 310 (1989) (holding that the U.S. Constitution protects against price limits that are so unjust as to be confiscatory); *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 53 (1936) (holding that so long as the rates set are not confiscatory, the Fifth Amendment does not bar their imposition).

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[8] Hillsboro states that the Court of Appeal "did not dispute that Hillsboro had suffered significant economic injury because of the City's violation of Hillsboro's civil rights." (Pet. p. 7.) This is a patently false misstatement of the decision below. The Court of Appeal never considered the question of whether Hillsboro had suffered economic injury because Hillsboro never stated that it had suffered economic injury. In fact, the Court of Appeal ruled that the decision might have been different had Hillsboro done so. (Pet. App. A p. A-18.)

As the Court of Appeal succinctly explained:

> Hillsboro's argument proceeds on the unarticulated premise that a property owner has the constitutionally protected right to charge as much as he or she wants for the use of property, so that enforcement of an invalid rent ceiling deprives it of a constitutionally protected right. That is not what the federal or state Constitutions, or *Kavanau*, *Galland* or any other case, protect.

(Pet. App. A, p. A-13.)

Denial of a fair return is the sine qua non for relief under the state and federal Constitutions. As the Court of Appeal correctly pointed out, Hillsboro has not demonstrated the requisite denial of a "fair return." (Pet. App. A p. A-15.) Rather than demonstrating that it has been denied a fair return, Hillsboro argues it suffered a taking because it was not able to impose noticed rent increases that exceeded the increases permitted under the Ordinance. (Pet. p. 6.) Hillsboro's position is based on a faulty premise. Hillsboro has not suffered a constitutional injury simply because it was affected by the application of an ordinance which was found to be defective. Regardless of the validity of the Ordinance, Hillsboro is not entitled to compensation unless it can establish the Ordinance deprived it of a constitutionally protected right.[9] In the

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[9] See for example, *Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) [even if regulation authorized use of constitutionally excessive force, no cause of action under 42 U.S.C. § 1983, absent constitutional injury arising from actual use of such force]; *Carey v. Piphus*, 435 U.S. 247, 253-254 (1978) [recovery of substantial damages under 42 U.S.C. § 1983 requires proof not only of violation of constitutional right but that plaintiff's injury was caused by deprivation of constitutional right];

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context of rent control, a taking arises only where the landlord is denied a fair and reasonable return. *Florida Power*, 480 U.S. at 253; *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 308, 310 (1989); *Jersey Cent. Power & Light Co. v. F.E.R.C.* 810 F.2d at 1181, fn.3. A property owner has no constitutional right to charge excessive rents. *Pennell*, 485 U.S. at 20-21 (Scalia, J., concurring). Absent a demonstration that it has been denied a fair return, Hillsboro does not have a constitutional right to impose unregulated rent increases.

Hillsboro's takings claim is fatally flawed because it omits this crucial element of a takings claim – a demonstration that the Ordinance has deprived Hillsboro of a "fair return." Accordingly, the Court of Appeal's decision was correct as it comports with long established state and federal precedent including *First English*.

III. THE ISSUES PRESENTED BY HILLSBORO DO NOT WARRANT REVIEW UNDER RULE 10 OF THE SUPREME COURT RULES.

Hillsboro's Petition does not warrant Supreme Court review. Review on a writ for certiorari is granted only for

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Utah Animal Rights Coalition v. Salt Lake City Corp., 371 F.3d 1248, 1260-1261 (10th Cir. 2004) [demonstrators not entitled to damages for delay in issuing permit even though ordinance governing issuance of permits was later declared to be unconstitutional]; *Diesel v. Town of Lewisboro*, 232 F.3d 92, 103-104 (2d Cir. 2000) [no "cognizable constitutional injury" from denial of preferential police treatment, even if selective enforcement of law was based on constitutionally impermissible consideration]; *Reyes v. City of Lynchberg*, 300 F.3d 449, 455-457 (4th Cir. 2002) [no per se cause of action under 42 U.S.C. § 1983 for prosecution under ordinance later held to be unconstitutional]; *Richardson v. City of South Euclid*, 904 F.2d 1050, 1053-1055 (6th Cir. 1990), cert. denied, 498 U.S. 1032 (1991) [same].)

compelling reasons. S. Ct. R. 10. Supreme Court Rule 10 sets out the considerations guiding the Court's decision on whether to grant certiorari. When reviewing state court decisions, the Court considers whether:

> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or a United States court of appeals;
>
> (c) a state court or United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> S. Ct. R. 10.

Rule 10 considers whether the subject decision is made by the state court of last resort. Thus, the rule suggests that decisions by state intermediate appellate courts are less important. There are good reasons for this view. First, a decision by a state intermediate appellate court is less likely to be considered outside of its jurisdiction. Second, the decision of the intermediate appellate court can be corrected later by the state court of last resort. Here, the California Court of Appeal rendered the decision subject to this petition. It is not the court of last resort. California's court of last resort, the California Supreme Court, denied review of this case.

Even assuming the decision was rendered by a California court of last resort, none of Rule 10's considerations are met by Hillsboro's petition. Hillsboro has not asserted that the state court decision conflicts with the decision of another state court of last resort or United States Court of

Appeals. Although Hillsboro alleges that the Court of Appeal decision violates *First English's* mandate that just compensation be available if a taking is shown, this characterization of the Court of Appeals' decision is incorrect. Hillsboro neglects to mention that it utterly failed to demonstrate a "taking" had occurred to either the trial court or the Court of Appeal. This Petition is, quite simply, an effort to obtain United States Supreme Court review of a decision which follows clear federal law on regulatory takings. Hillsboro's tortured attempt to characterize this decision as an improper denial of any and all remedies for an alleged taking finds no support in the facts or caselaw. Hillsboro cannot establish that it was in fact denied a fair return by the City's application of its Ordinance. As a result, Hillsboro has failed to justify this Court's review.

CONCLUSION

This is a simple case of faulty pleading and of a record that fails to sustain any claim for a regulatory taking. Neither the decision below nor the record raises the Questions Presented regarding California state courts' willful noncompliance with federal precedent or entitlement to direct review of Hillsboro's regulatory taking claim by the U.S. Supreme Court. Even if Hillsboro's petition were not denied on these procedural grounds, it should be denied on substantive grounds. Both the trial court and Court of Appeal in this case applied well-settled law to undisputed facts and found that Hillsboro could state no claim due to its failure to allege any sort of denial of a fair rate of return on its investment. Moreover, there is no legal support for Hillsboro's contention that under *San Remo* its case should be deemed ripe for U.S. Supreme

Court review. Finally, as Hillsboro is unable to cite any grounds for review pursuant to Rule 10, this Court should deny Hillsboro's Petition.

DATED: November 10, 2006

Respectfully submitted,

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